BOOK REVIEWS / BOEKRESENSIES

Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann by AJ Barnard-Naudé, D Cornell and F du Bois (eds). Juta & Co Cape Town 2009. xiv & 297 pp. ISBN 9780702181375. Price R375.00

This collection of essays had its origin in a conference that was held at the University of Cape Town in July 2007 to pay tribute to the constitutional jurisprudence of Laurie Ackermann. It contains the papers delivered at the conference, together with the Ben Beinart Memorial Lecture delivered by Jeremy Waldron a day earlier. Exploring, celebrating and critiquing key aspects of Justice Ackermann's contribution to the development of the Constitutional Court's jurisprudence, the volume manages to transcend the strictures of both the *Festschrift* and conference proceedings format and becomes an extensive reflection on the transformative potential of South Africa's Constitution and of constitutionalism in general.

The contributions are varied and draw on a rich diversity of theoretical perspectives. It is, nevertheless, possible to identify a number of themes running across the various essays. Not surprisingly, given Ackermann J's pioneering work in these areas, human dignity and freedom loom particularly large. But dignity and freedom are complex and contested ideas which evoke a range of other ideas, tensions and aporias. Dignity calls to mind the tension between the universal and the particular, and between the absolute respect which is due every human being and the inevitability of limitations on the right to dignity. Freedom refers to negative and positive freedom, revolutionary freedom, subjective freedom and relational freedom. Moreover, mention of both dignity and freedom raises questions about their relationship to equality, difference and socio-economic justice.

These issues are all explored in this volume. While the tone of the discussion is, at times, unabashedly philosophical, the various contributors' analyses remain situated within two contexts, which are both evoked by the book's title. On the one hand, the explorations of dignity, freedom and related ideas are framed by the authors' understanding – and, at times, critical examination – of what it means to live and write in a post-apartheid legal order. On the other hand, most of the essays focus specifically on the context of constitutional adjudication, and explore the possibilities and limits of adjudicative strategies in helping to facilitate the transformation of the ways in which law undergirds and structures social power.

While I cannot hope to do justice to the individual contributions within the confines of this review, I will allude to some of the debates opened up in the volume by picking at a few of the themes identified above. It is perhaps fitting to start with the views expressed on the nature of South Africa's constitutional revolution (some authors insist that it is precisely that, despite the lack of a rupture in the chain of legality) and the meaning of the designation "post-apartheid" legal order. For Roger Berkowitz ("Revolutionary

Constitutionalism: Some Thoughts on Laurie Ackermann's Jurisprudence"), Ackermann J's judgment in *Ferreira v Levin NO* 1996 2 SA 621 (CC) marks a return to the origins of the new constitutional order. Drawing on Hannah Arendt's work on revolution, he argues that Ackermann is here involved in the revolutionary activity of debating the meaning of and re-enacting the founding experience of the nation. On this analysis, the constitutional revolution created spaces of political freedom in which the uncertainty and excitement of revolutionary political action can be re-enacted. AJ Barnard-Naudé ("Beyond the Brother: Radical Freedom") also invokes Arendt's political thought in his characterization of the post-apartheid order as a post-totalitarian legal order in need of a radical understanding of freedom. Criticizing the subjectivism of the negative understanding of freedom enunciated in Ackermann's judgment in *Ferreira*, he draws on the work of Jean-Luc Nancy and others to articulate freedom with relation. Whereas apartheid rested upon the elimination of the spacing between the self and the other and thus branded difference as a mark of inferiority, the post-apartheid legal order promises a radical freedom which secures a space of sharing in which human beings can appear in their incommensurability and singularity.

This vision of a democracy to come has some affinity with Drucilla Cornell's take on the nature of South Africa's constitutional revolution ("Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence"). Cornell argues that the Constitution, by grounding legality in an ideal community or a Kantian kingdom of ends, appeals to an ethical realm which exists only as an aspirational ideal. Unlike, for instance, HLA Hart's rule of recognition which grounds the legal system in a social fact, the Constitution points beyond the sheer facticity of social life to an ethical humanity. On this view, Ackermann J's recognition in *Ferreira* of a residual right of freedom points towards an ethical future which cannot be fully captured in the categories and taxonomies of the law as it is.

A number of authors defend the idea of human dignity against the charge that it is too individualistic to respond to structural and group-based disadvantage. Allen Wood ("Human Dignity, Right and the Realm of Ends") argues, on the basis of his analysis of Kantian moral philosophy, that dignity is a radically egalitarian ideal which subverts any cultural traditions or social institutions that instrumentalise human beings or treat some individuals as inferior. He is particularly critical of the market economy, which legitimizes vast inequality and narrowly self-interested behaviour in the name of freedom and the rational pursuit of self-interest. For Wood, as for Cornell, the dignity of the individual can only be thought within the context of a community of shared ends. Peggy Cooper-Davis ("Toward a Relational Constitutionalism") similarly links dignity to a relational jurisprudence which resists the privileging of the perspectives of the powerful and affluent, and facilitates new constitutional imaginations through a reactive constitutionalism which is attentive to those voices which, historically, have been inhibited, subordinated or silenced.

In this respect Dennis Davis ("Judge Ackermann and the Jurisprudence of Mourning") is the sole dissenting voice. In Davis' view dignity, as employed by the Constitutional Court, is individualistic at the core. The primacy

accorded to dignity springs from the same ideological source as Ackermann J's insistence, in *Ferreira*, on a negative understanding of freedom as well as the Court's failure, in cases concerning the horizontal application of the Bill of Rights, to come to terms with relations of social power. For Davis, this signals a yearning for a return to the individualistic common law narrative that was shattered by apartheid and a consequent failure to construct a new story that can live up to the demands of the post-apartheid constitutional order.

Judge Ackermann's construction in *Ferreira* of a residual right to freedom elicits a diversity of responses, as should already be evident from the foregoing. Francois du Bois ("Freedom and the Dignity of Citizens") notes that Ackermann J derives this right not from Kant's notion of moral dignity but from his legal theory. Unlike the former, which does not support a strong version of moral self-determination, the latter is better equipped to ground a right of general freedom. Whereas Kant's moral writings conceive of individuals in abstract, impersonal terms and demand respect only for their moral capacity, his legal writings are concerned with the respect due to concrete, socially embedded persons. Du Bois distinguishes, accordingly, between the abstract dignity of humanity and the dignity of citizens. The dignity of citizens is a relational concept which presupposes a shared realm of meaning. The negative freedom that Judge Ackermann derived from it is, in the author's opinion, itself intermeshed with social practices and is therefore not irreconcilable with positive freedom.

Anton Fagan ("Dignity and the Political Right to Freedom") has different ideas about the basis of a general right of freedom. For him, neither the interest protected by the right to freedom nor the duty imposed by it upon the state is best explained in dignitarian terms. Fagan concludes that, since autonomy and not dignity provides the most cogent explanation of the right to freedom, freedom is best conceived not only in negative but also in positive terms.

Sandra Liebenberg ("The Value of Freedom in Interpreting Socio-Economic Rights") explores the meaning of freedom from a socio-economic rights perspective. Drawing on the relational feminism of Jennifer Nedelsky and the capabilities approach of Amartya Sen, she argues for a richer understanding of freedom which recognises that freedom depends in part on a network of social relations and material conditions. This understanding is attentive to the ways in which "private" relations are structured and enforced by the power of the state. It interrogates the implications of state measures for the capability of those affected to become autonomous, and asks whether and to what extent it respects and promotes their agency and active participation. In Liebenberg's view, the tension between positive and negative freedom must be upheld and used creatively, rather than simply abandoning the former in favour of the latter.

Frank Michelman ("Freedom by Any Other Name? A Comparative Note on Losing Battles While Winning Wars") asks, with reference to the views expressed elsewhere by Bishop and Woolman, whether Ackermann J's construction of a residual right to freedom did not, despite its formal rejection by the majority in *Ferreira*, prevail in the end in the form of the Court's dignity and privacy jurisprudence. Michelman develops a number of distinctions in

the course of a careful and nuanced reading of that jurisprudence: between the recognition of a right to freedom that extends to all human activities, no matter how trivial, or only those unenumerated freedoms deemed to be "fundamental"; between informational and decisional privacy; and between a quasi-delictual and libertarian construction of privacy. This leads him to conclude that, while fundamental aspects of freedom that are not enumerated in the constitutional text are indeed protected under the rubric of dignity and privacy, this still falls short of the residual freedom, unrestricted in scope, that Ackermann J asserted in *Ferreira*.

The ideas of dignity and freedom also call forth questions of identity and difference. These questions acquire a particular relevance and urgency in a society like South Africa, in which the traces of past patterns of discrimination are still all too visible. For instance, is it a legitimate strategy to valorise identities that have been oppressed, sidelined or branded inferior in the past? Or does that risk a return to the essentialism and conformism that lie at the root of past discrimination? In his essay, Jeremy Waldron ("The Dignity of Groups") examines the feasibility of notions of group dignity. Waldron takes seriously the proposition that, since there is a collective dimension to prejudice, such prejudice can only be countered effectively through a commitment to the equal dignity of groups. He clearly has something more affirmative in mind than what he terms *Hugo*-dignity, named after a Constitutional Court judgment (*President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC)) in which the Court defined equality in terms of the equal respect due to persons *regardless* of their membership of a particular group. At the same time, he is worried that the recognition of group dignity may re-introduce forms of hierarchy and subordination (for example, of women) that are inconsistent with the dignity of the individual. Waldron concludes with a plea for the affirmation of group dignity without identity, that is an understanding of group dignity that is uninformed by assumptions of homogeneity and unity. (Perhaps this can be labelled *Pillay*-dignity after the judgment in *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC). In this case the Constitutional Court recognised the expressive and constitutive value of group membership, yet resisted the idea that cultures are monolithic and accorded cultural and religious practices that are voluntary the same measure of protection as those that are mandatory.)

Pierre de Vos argues in his essay ("From Heteronormativity to Full Sexual Citizenship? Equality and Sexual Freedom in Laurie Ackermann's Constitutional Jurisprudence") that sexual liberation cannot be achieved simply through the legal inclusion of sexual minorities without challenging the underlying power relations that normalise heterosexual desire, brand other forms of desire as deviant and privilege heterosexual institutions such as marriage. Inclusive strategies end up restricting societal acceptance to those gays and lesbians who conform to the model of the good heterosexual citizen. De Vos applauds Ackermann J's judgment in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) as one which resists unified sexual categories and undermines heteronormative power. However, he is far more critical of Ackermann's judgment in *National Coalition for Gay*

and Lesbian Equality v Minister of Home Affairs 2000 2 SA 1 (CC), in which the word "spouse" is interpreted restrictively and protection for partners in a same-sex relationship is conditioned on the degree to which they conform to the model of heterosexual marriage. Jaco Barnard-Naudé ("Beyond the Brother: Radical Freedom") similarly asks whether the refusal in the latter judgment to share out the word "spouse" is not an instance of a "fraternity" aimed at the preservation of likeness, as opposed to the recognition of radical difference.

A number of essays pay tribute to Judge Ackermann's contribution to the development of a style of judicial reasoning that is suited to the interpretation of a transformative constitution pointing towards an ethical future. Catherine O'Regan ("From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann") emphasises Judge Ackermann's collegiality, diligence, modesty and anxiety that his intuitions about justice may be wrong. For her, one of his finest contributions lies in his knack for reasoning from fundamental normative principles, as opposed to reasoning from precedent or a style of judicial avoidance. Peggy Cooper-Davis ("Toward a Relational Constitutionalism") notes that Ackermann J's judgment in the first *National Coalition for Gay and Lesbian Equality* case, unlike the judgment of the United States Supreme Court in *Lawrence v Texas* 539 US 558 (2003), engages the voices, needs and concerns of members of the gay community.

Theunis Roux ("The Dignity of Comparative Constitutional Law"), in turn, focuses on Ackermann J's contribution to comparative constitutional law and asks how his commitment to a comparative methodology ties in with his dignity jurisprudence. Noting that comparative constitutional law has played a relatively minor role in the development of the Court's dignity jurisprudence and that it is Kant's categorical imperative, as mediated through the Court's understanding of the injustices of the past and the indigenous concept of *ubuntu* that has inspired and informed this jurisprudence, Roux nevertheless argues that these two aspects of Ackermann J's legacy are closely related. Underlying Ackermann's comparative endeavours is his belief that there are certain shared principles that can rise above the differences among open and democratic societies. In his view the inviolability of human dignity is clearly such a principle.

As I read through these essays I was reminded of a variety of issues that are not confronted head on in this volume, but that can benefit from the analyses contained therein. The tension between the Constitution's ethical and aspirational dimensions and law's compulsion with stability and order is one such issue. For example, does the critique of the judgment in the second *National Coalition for Gay and Lesbian Equality* case indicate the limit of law's capacity to respond to claims for the accommodation of difference? Can law only ever accommodate difference by reducing it to a variation of the same? How are we to disassociate dignity from dignified behaviour, democracy from vertical, statist processes and citizenship from the image of the ever so straight owner of a suburban home whose children attend a former model C school? And so on and so on.

Another such issue relates to the rights of non-citizens. Our courts have, to invoke Du Bois's distinction, delinked the basic moral dignity which accrues to every human being from the dignity of citizens. In cases like *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) and *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) the right of certain categories of non-citizens not to be reduced to a life of degradation was recognised, even if they did not qualify for rights of full citizenship. And yet these judgments, by distinguishing between different categories of non-citizens, threaten to re-introduce into the idea of dignity the very notions of rank that are ruled out by the insistence that equal moral dignity vests in all human beings, regardless of their personal attributes or membership of a particular political community. The distinction and overlap between moral dignity and the dignity of citizens, and the critical importance of the need not to collapse humanity onto a bounded political community are issues in need of serious consideration.

Dignity, Freedom and the Post-Apartheid Legal Order is a fitting tribute to the ground-breaking work of Laurie Ackermann. It is the best collection of essays on dignity and freedom that I am aware of, either nationally or internationally, and it is certain to stimulate further debate. The conceptual vocabulary and theoretical insights developed on these pages, together with the intersections, dissonances and gaps between the various essays will undoubtedly assist in the further development of a critical post-apartheid jurisprudence.

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